

Debra Jones, et al. v. USA

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4/12/2018

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1 P R O C E E D I N G S

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3 (Proceedings called to order, 2:45 p.m.)

4 THE COURT: Good afternoon.

5 COUNSEL: Good afternoon, Your Honor.

6 THE COURT: The case on the docket is Debra
7 Jones, et al. against the United States, case number
8 13-227. And this is a hearing to try to determine how to
9 move forward. Let me first start by asking counsel of
10 record to introduce themselves and also anyone else who
11 may be at counsel table with them.

12 Let's start with the Plaintiff.

13 MR. RASMUSSEN: Jeffrey Rasmussen for the
14 Murray Family and Debra Jones. Debra Jones is here with
15 me and her husband, Jason.

16 THE COURT: Very good. Thank you. Welcome.

17 MR. PETRIE: Good afternoon, Your Honor. Terry
18 Petrie for the United States. I'm joined by Jody
19 Schwarz, also from the Department of Justice. We also
20 have at table Mr. Christopher Donovan on the left, and
21 he's counsel from the FBI, and also Mr. Jim Porter from
22 the Department of Interior Solicitor's Office.

23 THE COURT: Okay, very good.

24 We all know why we're here. We have a remand
25 from the Court of Appeals for the Federal Circuit that

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1 found essentially that they did not agree with the issued
2 preclusion dismissal decision that I had issued on July
3 30th of 2015. The Federal Circuit's opinion was issued
4 about a year and a half later on January 27th, 2017, and
5 essentially sent the case back to this Court rejecting
6 the basis of issue preclusion for this trial court's
7 decision.

8 There are many things about the Circuit's
9 opinion that leave us here today basically starting from
10 scratch. When you take away the issue preclusion, that
11 means essentially that the decisions and the lengthy
12 decision of the Federal District Court and the appeal
13 decision affirming that District Court decision are not
14 necessarily the basis of the facts that we will go
15 forward with here in this Court. It will be very
16 interesting and very difficult, I think, to retry factual
17 issues that now date back a considerable amount of time.

18 The Circuit -- the Federal Circuit which sent
19 this case back to us essentially took the position that
20 if you strip out the issues that were decided by this
21 Court and affirmed by the 10th Circuit that we have to
22 start not with those decisions which did find spoliation
23 didn't change the nature of the situation, but that we
24 have to start with spoliation as our first issue, which
25 is the issue that's been briefed prior to today's

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1 get-together, so to speak, which I view as talking about
2 the spoliation issues, but also talking about where we go
3 from here.

4 The Court indicated that once this Trial Court
5 looks at the issues of spoliation, then, in fact, this
6 Court -- and I'm quoting now from the opinion. "If the
7 CFC concludes on remand that the spoliation sanctions are
8 not appropriate or that the appropriate sanctions would
9 not change the evidentiary landscape for particular
10 issues, the CFC may reconsider the application of issue
11 preclusion. If it determines the sanctions are
12 appropriate and do change the evidentiary landscape, the
13 CFC should independently consider Jones' substantive
14 allegation of bad man violations."

15 So if we look at that, basically, as I
16 understand it, it leaves us with a number of courses that
17 we have to go down. Now, clearly, we have to deal with
18 whether spoliation sanctions are appropriate. The
19 Plaintiffs' papers, although asking for spoliation
20 sanctions -- and, Mr. Rasmussen, that's one of the things
21 that I'm going to want to hear much more specifically
22 from you is what sanctions you're really asking for. You
23 just sort of say sanctions with the -- in your briefing
24 with the understanding that sanctions would essentially
25 result in a win for your side. But that's necessarily

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1 true according to the Federal Circuit and, therefore,
2 can't be necessarily true for me either.

3 So we kind of have to go through a multifaceted
4 process at this point which is are sanctions appropriate.
5 If so, what should those sanctions be. What's the impact
6 of all global sanctions, of limited sanctions, of
7 individual sanctions, if any, and then if it's not a
8 global sanctioning which says essentially that it kicks
9 in the bad man statute, then we have to essentially retry
10 the case. And as I said earlier, that will be a
11 challenge to say the least.

12 Even on the spoliation sanctions, we've got
13 some problems in deciding what is and what isn't
14 factually accurate. The Circuit's factual statement was
15 very abbreviated, very summary, and even has in it some
16 conclusions that are not attributed to a particular
17 witness, but read like the conclusions of the Circuit.
18 And one of those that makes, I think, our lives for the
19 future quite difficult is in describing the exchange of
20 shots between the officers and the running Mr. Murray.
21 There's a statement without attribution that says all of
22 the shots missed. Now, that's obviously a very relevant
23 statement to what we're here to do.

24 And I don't want to minimize, particularly not
25 with Mr. Murray's family here in the room, the loss that

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1 you all endured is real. We understand that. I don't
2 even know how, as a parent, to say to you what you must
3 have gone through and still are going through, but that's
4 not the job of this Court in the sense that as much
5 empathy and sympathy as I may feel, I've got to follow
6 through to what, in fact, happened, which will be very
7 hard to figure out given the facts of this case, and also
8 figure out whether under the facts of this case the bad
9 man statute is triggered.

10 This is not a court of equity; this is a court
11 of law. We can't decide the case on the basis of equity.
12 If it comes down to me deciding the case in another
13 written opinion, the question will be, I think, probably
14 at this point as I look at it, the inevitability of
15 trial, with missing witnesses and everything else. I do
16 not agree with the Government that you're going to be
17 able to resolve this with another motion to dismiss. I
18 don't see that at this point. But, you know, we will be
19 talking about that down the line. I'm not ruling it out.
20 So what I would say to the Government is I don't see it
21 now. What I would say to the Plaintiffs, it could kick
22 back in and come back in as a force.

23 But I am somewhat confounded as to how we
24 figure out basically who shot whom. As all of you know,
25 this was difficult the first time and it's equally

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1 difficult now. I'm not condoning -- and you will find in
2 my original opinion some concern about how some of the
3 evidence was handled. I do have a law enforcement
4 background, way, way, way back, but that's how I started
5 my career, in law enforcement, as a prosecutor, as a
6 lawyer and a prosecutor.

7 Would I have handled the evidence the same way?
8 Probably not. But I say probably not and I also say that
9 it's very hard to reconstruct something this many years
10 after the fact, especially, you know, if we have to
11 basically revisit -- even though the Circuit said we
12 could reconsider issue preclusion once we get past
13 spoliation -- this is almost like we have to go through a
14 formality of spoliation before we can get to the rest of
15 the case.

16 I don't see a clear way. Right now, if you
17 were to ask me, I would say we'll go to trial. Is this a
18 good case for you all to get together and try to figure
19 something out? Is this a good case for ADR? Possibly.
20 Is there a potential for really lousy precedent on both
21 sides here? Absolutely. You know, I understand where
22 the Plaintiff here and the family would feel compelled to
23 go forward. This is not going to be a short process by
24 any means. And from the Government's perspective, this
25 could create really horrible precedent.

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1 As you all know, I also have a background at
2 the Department of Interior. I am probably as well
3 equipped to deal with these issues as I could be in terms
4 of background. You know, I've dealt with hard cases out
5 of the Department of Interior both here on the Court and
6 also when I was their Acting Solicitor and Deputy
7 Solicitor. But what we're really facing here is not a
8 quick process. I don't know the answer to whether there
9 was spoliation or not. I know that it wasn't maximally
10 ideal handling material, of the body, of the clothes, of
11 the gun. But it -- let's take the gun for a moment.
12 When you have multiple law enforcement agencies involved,
13 there are things that do happen. Were they permissible?
14 I don't know. That's the sort of detail at which I think
15 the Court is going to have to put its mind and sort
16 through each of these individuals.

17 I'm not sure that I feel that the briefing I've
18 gotten on spoliation, frankly on some of the specific
19 issues is focused or precise enough, having read the
20 briefing. And, of course, one of the major issues is
21 what do you really want here? Do you want -- if you
22 don't get it all, where are your compelling points from
23 the Plaintiffs' side in terms of individual items of
24 spoliation? If, for instance, you say, sure, they
25 shouldn't have done X with one of the objects that's

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1 involved here, a piece of clothing or whatever it might
2 be, does that trigger a full automatic walk into the dead
3 man statute? And I don't know that it does necessarily.

4 So you -- we find ourselves in a situation here
5 that as you talk about spoliation today, be very focused
6 on each of the things and think and bear in mind
7 whether we come to a conclusion today or whether we
8 come to a conclusion later on as to how you think once
9 you get a spoliation decision we will be proceeding.
10 You know, we do trials, that's what we do. And
11 usually I can conceptualize the trial pretty quickly.
12 I mean, I've been a litigator all of my professional
13 career on and off until they kicked me upstairs
14 periodically for management. But even then, I was
15 supervising litigation.

16 And then coming to the Court, which I've now
17 been on for over 30 years, I don't see this one clearly
18 yet. So I'm going to need your help in figuring it out.
19 But what I don't need is both sides digging in in such a
20 way that you all can't work together to figure out how to
21 get there from here in the most economic way, because
22 litigation is expensive obviously, in the most economic
23 and in the most realistic and in the most sensible way to
24 get a result.

25 If this were an equitable case, it would be

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1 easy. It's not; it's a legal case. So, you know, there
2 is certainly a compelling story to be made, but it has to
3 be a legally significant compelling story to get a win
4 for the Plaintiffs. So I don't know -- and, certainly,
5 Mr. Rasmussen, you should take some time, at some point,
6 to explain what I've said. Not that the English words
7 are hard to understand; they're not. The legal issues
8 are hard to understand for nonlawyers and I hope that you
9 will feel free through your attorney even today -- for
10 the Plaintiffs to feel free to pose questions so that I
11 can try to explain it more if it hasn't been clear.

12 This is not your sort of standard case because,
13 frankly, everyone in this, including the Court of
14 Appeals, that nobody will ever really be able to
15 determine who shot whom. And with that, it becomes quite
16 difficult. So that's just not something we're going to
17 know today with any kind of certainty. Whether
18 presumption kicks in or something of that sort, that's a
19 different issue.

20 So let's talk first and foremost about
21 spoliation and, Mr. Rasmussen, I guess you're up first.

22 MR. RASMUSSEN: Thank you, Your Honor.

23 I wanted to just briefly talk about a few
24 pieces of -- two pieces of evidence and then something a
25 little more subjective, I guess, before going into this.

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1 If we can pull up the screen for the Court.

2 THE COURT: Are we on?

3 MR. RASMUSSEN: There we go. This -- I'm not
4 sure what those green lines are, but this is the --

5 THE COURT: The green lines should be -- we
6 ought to be able to remove them.

7 (Pause in the proceedings.)

8 MR. RASMUSSEN: This is the gun that Officer
9 Norton says Todd Murray used to kill himself. And one of
10 the things we're talking about when we're talking about
11 spoliation is when we look at this gun, we don't see
12 blood on it, we don't see tissue on it. We have the
13 doctor saying this gun would be covered in blood and
14 tissue if it were the gun that shot Todd Murray, and it
15 isn't. And that's -- that's --

16 THE COURT: It isn't at what point in time?
17 When was this picture taken?

18 MR. RASMUSSEN: This picture was taken at the
19 scene.

20 THE COURT: Okay.

21 MR. RASMUSSEN: Yes.

22 THE COURT: And we all agree on that?

23 MR. RASMUSSEN: Yes, this is -- I believe it's
24 Exhibit 19 in our --

25 THE COURT: In the District Court case?

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1 MR. RASMUSSEN: Well, it was in the District
2 Court, but I believe it is Exhibit Number -- no, sorry.
3 I believe it was Exhibit 19 in this case if I recall
4 correctly for our spoliation motion.

5 THE COURT: Mr. Petrie, is this the picture --

6 MR. PETRIE: It is.

7 THE COURT: -- concurrent picture of the gun?

8 MR. PETRIE: Yes.

9 THE COURT: All right.

10 MR. RASMUSSEN: And that's -- that's one of the
11 things we're talking about when we talk about spoliation.
12 This gun is lying there and it looks like it has just
13 been set down. It does not look like the weapon that was
14 used to kill Mr. Murray.

15 THE COURT: Rather than press your head back
16 like that, just turn the screen so you can see it. It
17 should just be turned -- you ought to be able to see it
18 so that both of you can see it unless you're looking over
19 here. There's screens all over the place.

20 MR. RASMUSSEN: Yes. And so, you know, as we
21 say in our motion, we can't tell for sure what happened.
22 This doesn't look like a gun that was used to kill Todd
23 Murray. There wasn't testing done on it. There wasn't
24 testing to see if there was any blood on it, any tissue
25 on it. It certainly doesn't look like it, but it wasn't

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1 tested.

2 THE COURT: Now, if there were blood on it or
3 not --

4 MR. RASMUSSEN: Mm-hmm.

5 THE COURT: -- would that be definitive one way
6 or the other to say at what distance from -- and I
7 apologize for the goriness of this to the family, I
8 really do, but these are questions that have to be asked.
9 Will we ever know or do we know whether it was put up
10 against the head or whether it was a couple inches back
11 where there may or may not have been blood on it?

12 MR. RASMUSSEN: The --

13 THE COURT: I did try murder cases at one point
14 in my life.

15 MR. RASMUSSEN: Yes. And the -- what the --
16 there wasn't an autopsy, but what the physical
17 examination of the body -- the conclusion there was this
18 was up against his head, that it would have -- that
19 whatever weapon was used to do that and the hand of the
20 person that was pulling that trigger would have been
21 covered in blood.

22 THE COURT: Well, there was also the crossover
23 body issue.

24 MR. RASMUSSEN: There is not, yes.

25 THE COURT: There is that as well.

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1 MR. RASMUSSEN: Yes.

2 THE COURT: But how do I get from A to Z, in
3 other words? How do I say, okay, the absence of blood on
4 the gun in this picture --

5 MR. RASMUSSEN: Mm-hmm.

6 THE COURT: -- which was taken at the scene and
7 who knows how quickly and who knows who might have wiped
8 it and who knows -- there's just so many "who knows" in
9 there.

10 MR. RASMUSSEN: Mm-hmm.

11 THE COURT: What do I do with that in terms of
12 saying as to who was responsible for the spoliation?

13 MR. RASMUSSEN: Well, what we have is that the
14 officers have said that this gun wasn't wiped down, this
15 is how they found it. So we don't have those issues with
16 this gun.

17 THE COURT: But at what point? But at what
18 point?

19 MR. RASMUSSEN: They found it when they went --
20 I'm not sure about Officer Norton, but the other two
21 officers say that when they got there, the gun was lying
22 there on the ground and that it -- then they -- and as
23 you will see in a second, they said, let's not touch
24 anything here -- down here. Officer Norton still had
25 this gun, so that could have been cleaned. But this gun

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1 -- there's nothing to suggest that anything was --

2 THE COURT: So you're taking that from -- those
3 facts from the District Court opinion or from a
4 simultaneous report of the officers or from where are you
5 taking this? One of the things we're going to have to be
6 super careful about in this proceeding is to know where
7 we're getting a statement from because we've just been
8 told that we can't use issue preclusion.

9 MR. RASMUSSEN: Mm-hmm.

10 THE COURT: So it's not a very easy sort of map
11 to navigate here.

12 MR. RASMUSSEN: Right.

13 THE COURT: So where did you take that
14 statement about the officers from?

15 MR. RASMUSSEN: That statement is taken from
16 the officers' deposition testimony and it is -- so that
17 is their version of what happened. We, of course, don't
18 have -- you know, we can't confirm that. There's a whole
19 lot of uncertainty, I think, as to exactly what happened.
20 But their testimony was that this gun -- this is how it
21 was found. It's lying there on the ground not that far
22 from where Todd Murray is lying.

23 THE COURT: I guess what I'm saying to you is
24 -- and that's one of the things I want you all to do as
25 sort of supplemental briefing, is to attribute each of

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1 your statements that you've said prove whatever it is
2 that you think it proves or does not prove and indicate
3 to me from where it comes, from whence it comes, because
4 we've got this problem is we cannot accept on faith
5 anything out of the District Court opinion.

6 MR. RASMUSSEN: Mm-hmm.

7 THE COURT: Very unusual situation. But it is
8 what it is.

9 MR. RASMUSSEN: Mm-hmm. And I think when we're
10 talking about the gun and whether there was evidence
11 spoliated, with regard to that gun is what we got here is
12 the officers saying this is how it was found. There's no
13 suggestion that they attempted to clean up the gun. They
14 don't make any suggestion that they did anything of that
15 kind, this is how it was found, that it was kept in place
16 actually and then photographs were taken of it. This is
17 a closeup photograph of it. There are other -- numerous
18 photographs of it. This is a closeup -- the closest
19 picture and it just doesn't seem to show any blood on it.

20 THE COURT: Well, one of the things that I find
21 very interesting is that you have asked for a default
22 judgment.

23 MR. RASMUSSEN: Mm-hmm.

24 THE COURT: They're very rare as you know.

25 MR. RASMUSSEN: Mm-hmm.

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1 THE COURT: I think this Court hasn't given any
2 recently, and the one time where it was considered, it
3 was obviated in the more recent -- the one more recent
4 case that we do have. Do you see everything here to so
5 clearly demonstrate your perspective that you can support
6 a default judgment here? I'd like to get this one out of
7 the way initially because I think -- and Mr. Petrie can
8 address it, and I'm sure he will oppose it because the
9 Government always does oppose default judgments against
10 it on some super-territorial grounds, as well as on the
11 rules, but the rules do allow for it, but it has to be
12 pretty clear. And why is this a default judgment case?

13 MR. RASMUSSEN: Well, what has to be clear is
14 that that is the remedy that will rewrite the scales in
15 the --

16 THE COURT: We're not a court of equity,
17 remember; we're a court of law.

18 MR. RASMUSSEN: Right.

19 THE COURT: So the thing we have to figure out
20 is -- which I don't think we can -- the easiest way would
21 be who shot whom. I don't think we can do that. Then we
22 need to see what happened to each of these potential
23 pieces of evidence and who was the cause of it not being
24 treated in an ideal fashion or not tested or, yes, tested
25 or removed or not removed. You know, there were some

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1 things done to the body, obviously, that we have
2 unexplained as well. But, once again, that would be an
3 equitable discussion as opposed to a legal one. You
4 know, they did take that second sample of blood. The
5 issue isn't that they took it. The issue would be what
6 they did with it or didn't do with it. So I think we
7 have to be super careful here.

8 MR. RASMUSSEN: Mm-hmm.

9 THE COURT: And I think given all the
10 confusion, frankly, or lack of definitive conclusions,
11 why default judgment is even on the table is, I guess,
12 what I'm asking you.

13 MR. RASMUSSEN: Okay. And I think the -- kind
14 of the simple answer is that's the only remedy that
15 really -- that really can bring the scales back level.

16 THE COURT: Well, let me suggest to you that
17 you need to have a reason for a default judgment because
18 in a default judgment, if you remember, the rules are
19 very clear that it has to be clearly demonstrated to the
20 Court that that's the appropriate remedy.

21 MR. RASMUSSEN: Right.

22 THE COURT: And given all of the unclear issues
23 in this, it is not easy to conclude that it's clear that
24 a default judgment is correct. So, I mean, unless you
25 have something more, we can move on. I mean, I'm not at

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1 a default judgment, obviously, from what you're saying.

2 MR. RASMUSSEN: Right, right.

3 THE COURT: But I'm willing to hear from you if
4 there's something that you can say to that point.

5 MR. RASMUSSEN: And the thing that I would say
6 to that point is that when we're looking, for instance,
7 at something like this gun and we're saying -- what we
8 have to do is we have to say what is the appropriate
9 sanction because of this spoliated evidence. And when we
10 look at something like this we say, if this gun had been
11 tested and if it did not have Mr. Murray's blood on it,
12 as it appears, than Officer Norton's story is completely
13 false. Then we know that.

14 THE COURT: Why do we know that?

15 MR. RASMUSSEN: Because that is his story.
16 This is the gun that was used to kill Mr. Murray.

17 THE COURT: But -- correct. But why do we know
18 that, A, the gun wasn't far enough away or at an angle or
19 at a place where it wouldn't have gotten blood over it,
20 or B, how do we know who, if theoretically -- and we have
21 no reason to believe it was, but if theoretically
22 somebody ran in there and wiped it, how do we know who
23 that was? They haven't accounted for all the time in
24 between.

25 MR. RASMUSSEN: Right.

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1 THE COURT: And so there's a time gap.

2 MR. RASMUSSEN: Right. And I agree with all
3 that. I -- this gun, there's no suggestion at all or any
4 reason that anyone would have wiped blood off of it.

5 THE COURT: But we -- that's my point.

6 MR. RASMUSSEN: Okay.

7 THE COURT: To get a default judgment, we
8 really can't be speculating.

9 MR. RASMUSSEN: Right.

10 THE COURT: Because you have to demonstrate to
11 the Court -- the rule is very clear.

12 MR. RASMUSSEN: Right.

13 THE COURT: You have to demonstrate to the
14 Court that that's the right way to go. And I'm
15 paraphrasing, but with all of the vagaries here -- I
16 mean, I'm not saying you can't win in the end.

17 MR. RASMUSSEN: Right.

18 THE COURT: I have no idea, frankly, because we
19 haven't gone through all the analysis we will need to go
20 through either on spoliation or, if necessary, a trial.
21 But summary judgment or default judgment are very
22 specific things. The Government would like a motion to
23 dismiss. I don't think this is ever going to go to
24 summary judgment. You want a default judgment. I don't
25 see how you get to a default judgment at this stage of

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1 the proceedings under any circumstances. And I'm being
2 totally candid with you.

3 MR. RASMUSSEN: Right, right.

4 THE COURT: I mean, that's why I'm saying, give
5 me your best shot.

6 MR. RASMUSSEN: And our best shot and this is
7 what I view as -- that that is the appropriate remedy
8 here is that if the evidence -- even the basic evidence,
9 we can talk about some of the -- you know, we talk in our
10 brief about 11 different pieces of evidence and some of
11 them are really important and some of them are less
12 important and it's partially -- the whole list is to show
13 a pattern here. But a couple of these pieces of
14 evidence, if very basic testing had been done, we would
15 know what happened. We would know. I believe that this
16 gun is one of those. If it does not have -- and, you
17 know, we can look at it. Superficially, it doesn't
18 appear to, but there wasn't the forensic testing to say,
19 oh, yeah, there definitely isn't any blood on this gun
20 that there would have been if it had been the gun that
21 shot Todd Murray.

22 THE COURT: Okay. I hear your argument. We
23 can move on.

24 MR. RASMUSSEN: Okay. And so what we have then
25 is what do we do with some piece of evidence like this.

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1 If we had had that testing, this gun would either be
2 proven to be not the gun that shot Todd Murray or likely,
3 but not definitely, the gun that did shoot him.

4 We have the same thing with Officer Norton's
5 gun. Again, very basic testing for that gun. Was there
6 blood or tissue on it? If there was blood or tissue on
7 that gun, that would definitively prove that that was the
8 gun that shot Todd Murray because the whole of his story
9 was he never got anywhere near Todd Murray and so there
10 would not be blood on his gun. But they didn't do any of
11 those basic tests of the two guns that they say were shot
12 that day.

13 And so that's -- that's where when we have to
14 figure out what do we do with that and we have to say,
15 well, what is the appropriate remedy for the failure to
16 gather what could have been dispositive evidence -- basic
17 dispositive evidence, if we say, well, then they can't
18 use the evidence related to those guns or they can't --
19 our expert would be allowed to assume that the -- as the
20 gun looks -- appears to be that it didn't have blood on
21 it. If our expert can assume that that gun does not have
22 Todd Murray's blood on it, then our expert can give an
23 opinion that is going to be pretty definitive.

24 THE COURT: Well, but that's -- that's exactly
25 my point. I mean, you may be able to get an expert,

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1 although I honestly believe experts are quite malleable
2 sometimes. But --

3 MR. RASMUSSEN: Not ours.

4 THE COURT: -- you may -- no, yours, of course
5 not.

6 MR. RASMUSSEN: Right.

7 THE COURT: And I'm not questioning it. It
8 becomes a battle of the experts. We all know how that
9 works.

10 MR. RASMUSSEN: Right.

11 THE COURT: Credibility and whatever. But --
12 and some experts are very good and some experts blow you
13 out of the water immediately and you say, okay, that's
14 the one I believe. But it's even more basic than going
15 to trial. It may be -- and you've raised it, but I
16 thought of it -- it may be that even to figure out
17 spoliation, we do need those experts and we need to do a
18 hearing. What's your response to that?

19 MR. RASMUSSEN: I was thinking actually that if
20 we're talking, for instance, about being able to assume
21 that this picture -- that this gun doesn't have blood on
22 it --

23 THE COURT: But you're assuming, that's my
24 problem.

25 MR. RASMUSSEN: Right, right, and I know. If

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1 we assume that this gun doesn't have blood on it, I don't
2 know that the United States has an argument, and that's
3 the difficulty. I didn't really see it as something
4 where we would even need an expert --

5 THE COURT: Well, we'll find out, won't we?

6 MR. RASMUSSEN: What?

7 THE COURT: Even their papers suggest that
8 there's a problem.

9 MR. RASMUSSEN: What?

10 THE COURT: Even their papers suggest that
11 there is nothing that we can assume here.

12 MR. RASMUSSEN: Well, but what I'm saying --
13 what we've got right now is, as far as I understand, the
14 evidence is everybody agrees that if this was the gun
15 that shot Todd Murray, it would have blood on it. If we
16 can assume, as a spoliation remedy even, that it doesn't,
17 I think we're done. And that's why I think it is where
18 the remedy is probably appropriately either directly as
19 just, well, we'll just grant default judgment or that --
20 have them come back with an expert who can say, oh, yeah,
21 even if this gun doesn't have blood on it, you know, it
22 still could be the murder weapon.

23 THE COURT: So --

24 MR. RASMUSSEN: I don't think they could do
25 that because I think -- what I've read in the evidence is

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1 everybody agrees that the gun that shot him would have
2 blood on it. That was one of the troubling facts in this
3 case was this gun doesn't appear to. And if we had the
4 forensic testing --

5 THE COURT: I don't get the sense that every --

6 MR. RASMUSSEN: -- we'd know that for sure.

7 THE COURT: I don't mean to interrupt, sorry.
8 I don't get the sense that everybody agrees on much of
9 anything in this case.

10 MR. RASMUSSEN: Well, I think -- I'll let them
11 speak for themselves.

12 THE COURT: Right.

13 MR. RASMUSSEN: But I was thinking we had
14 agreement on that point. This is Todd Murray's left hand
15 and we have the same exact thing. This is, as I
16 understand is, what they would claim is the hand that was
17 -- pulled the trigger.

18 THE COURT: This would be the right hand.

19 MR. RASMUSSEN: This is his left hand.

20 THE COURT: His left hand?

21 MR. RASMUSSEN: Right.

22 THE COURT: Do they agree that -- yes or no?

23 MR. RASMUSSEN: Well, that is something that I
24 don't think they necessarily agree to. But that what we
25 have theoretically is him reaching around, as you know,

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1 and shooting himself across --

2 THE COURT: There was a crossover, right?

3 MR. RASMUSSEN: Yeah. But going --

4 THE COURT: Potentially.

5 MR. RASMUSSEN: -- then going back to front, so
6 he was quite a ways around. Because his left hand
7 doesn't appear to have blood on it.

8 THE COURT: So do we know if he had long arms?

9 MR. RASMUSSEN: We know he doesn't have long
10 arms. He's a -- no, he doesn't. But that was one of the
11 things that I think we would -- one of the things I
12 didn't see in the expert reports that I think probably
13 could have been there is that, yeah, I think it was
14 probably physically impossible for him to have reached
15 around. But I don't -- I didn't see that in any of the
16 expert reports that I've seen so far.

17 THE COURT: Yeah, but unless we have agreement
18 that it was the -- not the left hand, but the right hand
19 that everybody would agree to --

20 MR. RASMUSSEN: Right.

21 THE COURT: -- then we've got a difference here
22 as well.

23 MR. RASMUSSEN: Right. So this is one of the
24 pieces of evidence that isn't necessarily dispositive. I
25 think the gun itself -- forensic testing of the gun would

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1 have been -- the guns -- would have been dispositive.
2 But this wouldn't be dispositive because there is that
3 disagreement. And so -- but it certainly doesn't seem to
4 be consistent with Officer Norton's view.

5 THE COURT: So the one thing that we seem to
6 have agreement on is the shot entered sort of behind the
7 left ear. Is that correct?

8 MR. RASMUSSEN: Right, right, yeah, and exited
9 through the other side going a little bit forward.

10 The other two pictures that I wanted to show --
11 and I'll just briefly do the third one because I just
12 wanted to do it to get -- so we get a sense of the scene.
13 But this is Todd Murray lying there after he's been shot.
14 And this is the broader scene. And this is more
15 subjective, but the -- I think, in some ways, more
16 haunting -- that we have these police officers standing
17 there while he's bleeding to death and no one is talking
18 to him, no one is giving him comfort. They said that --
19 the officer standing closest in the white shirt said he
20 was told to stand where he was because there was a bullet
21 casing.

22 THE COURT: I mean, this has got to be very
23 hard for the family sitting here listening to this and
24 looking at these pictures. I suggest you -- when you're
25 finished with them, you take them off.

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1 MR. RASMUSSEN: Yes.

2 THE COURT: Like now would be good.

3 MR. RASMUSSEN: Okay, okay.

4 THE COURT: But, once again, there are some
5 equities here. There are some difficulties here. It's
6 not an easy thing.

7 MR. RASMUSSEN: Right.

8 THE COURT: But we've got a set of legal issues
9 we have to get through, not equity.

10 MR. RASMUSSEN: Right.

11 THE COURT: If this were a court of equity, we
12 could figure this one out much more easily, but we can't.

13 MR. RASMUSSEN: Right, right. And what we want
14 to -- what we want to do then is talk about what are the
15 legal requirements. And what we have to have, obviously,
16 is we have to have that the United States had the
17 authority and --

18 THE COURT: Okay. And what's the relevance of
19 this picture or why do we need to leave it up there?

20 MR. RASMUSSEN: Oh, sorry. I don't need it.
21 That's just my screensaver.

22 THE COURT: That's your homepage.

23 MR. RASMUSSEN: Yeah. I'm done with that
24 actually. We don't -- what we have to have is elements
25 of foreseeability and then a duty to preserve and then we

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1 talk about the scope of what -- what the duty to preserve
2 was and that they didn't preserve.

3 THE COURT: So is your best piece of evidence
4 in your mind -- I don't want to put words in your mouth
5 by any means, but it's just based on your conversation
6 now. Is the best piece of evidence from your point of
7 view the gun or what else would you think rises to the
8 level of this default judgment stage that you're arguing
9 or even a decision in your favor on spoliation?

10 MR. RASMUSSEN: Right. I think the main ones
11 -- the biggest ones are the two guns, that that evidence
12 would potentially have been dispositive and that the --
13 and it was very basic. When we're talking about, for
14 instance, blood spatter or things of that nature, that's
15 much more difficult and less of a, oh, this would have
16 definitely shown X, Y or Z, but that it would have helped
17 us to recreate exactly what had happened, where people
18 were, those sort of things. But when we're talking about
19 the guns, we're talking about one gun that doesn't appear
20 to have blood on it and that if it doesn't, then Officer
21 Norton's story is untrue. And there's nothing else
22 besides Officer Norton's story.

23 And then the other piece is Officer Norton's
24 gun and, again, or his -- and his clothing as well.

25 THE COURT: How many chambers were there in

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1 Officer Norton's gun? Because they say there was an
2 unused chamber. Do you know?

3 MR. RASMUSSEN: I do not know. I know he said
4 it was fired twice that day.

5 THE COURT: Fired twice and there was an unused
6 one.

7 MR. RASMUSSEN: I don't know. For the other
8 gun, there were -- it was -- there were two shell casings
9 and then there was the one stovepipe shell casing. So,
10 for instance, we have Officer Norton saying Todd Murray
11 shot at Officer Norton once and then turned the gun on
12 himself and, yet, we have three -- essentially three
13 shell casings from that gun.

14 THE COURT: So is part of your argument the
15 failure to preserve and the failure to test? Does that
16 get you something automatically in terms of spoliation?

17 MR. RASMUSSEN: Well, what we have to talk
18 about is whether the evidence that is not here, which
19 creates this difficulty that you've been talking about of
20 how do we try this case, which it is -- like I don't know
21 how we try this case. But that that evidence that is not
22 here, was it something that was relevant, that it should
23 have been gathered.

24 THE COURT: Well --

25 MR. RASMUSSEN: And it was plainly.

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1 THE COURT: But who had the duty to preserve
2 and how do we get through this really three-part law
3 enforcement group that was there?

4 MR. RASMUSSEN: Mm-hmm.

5 THE COURT: I mean, you had tribal, you had
6 local, you had FBI. How do we sort through that? And
7 maybe some more.

8 MR. RASMUSSEN: We had BIA law enforcement as
9 well as FBI, right.

10 THE COURT: BIA, correct.

11 MR. RASMUSSEN: Yes. Well, the way we get
12 through it -- and as I think the Court is aware, I was
13 not terribly a fan of the District Court of Utah's
14 decision in many ways, but --

15 THE COURT: I can imagine.

16 MR. RASMUSSEN: But it said --

17 THE COURT: You lost.

18 MR. RASMUSSEN: -- yes. And I did not see this
19 as -- I saw this as not a summary judgment case in that
20 Court. But the Court said, well, I'm not going to apply
21 spoliation sanctions and then there really isn't anything
22 besides this officer's testimony and, you know, no one is
23 going to disbelieve this police officer when he's
24 testifying when there's no significant contrary evidence
25 to rebut his testimony.

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1 But what the Court also said is BIA was the law
2 enforcement authority. They were the ones who were doing
3 the investigation. They were the ones that had the legal
4 responsibility for the criminal investigation. And our
5 review is that spoliation sanctions don't apply solely
6 because of the criminal investigation, that spoliation
7 are also a civil issue and that they should apply then --

8 THE COURT: But we have the offsite,
9 off-reservation hospital and various components.

10 MR. RASMUSSEN: Mm-hmm.

11 THE COURT: How does that play into it?

12 MR. RASMUSSEN: Well, we do have some
13 spoliation in those locations.

14 THE COURT: In the --

15 MR. RASMUSSEN: I think that is -- and the
16 officers certainly, at that point, also, the FBI has --
17 they're the investigative agency for this homicide. We
18 definitely have a homicide -- an officer-involved
19 homicide and we have rules for gathering evidence and
20 preserving evidence and they were violated at the --

21 THE COURT: Well, you just said to me -- and I
22 guess help me out here --

23 MR. RASMUSSEN: Right.

24 THE COURT: -- because you just said to me BIA
25 had the responsibility, now you're saying the FBI had the

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1 responsibility.

2 MR. RASMUSSEN: Oh, I'm sorry, I did not mean
3 to say BIA.

4 THE COURT: Okay.

5 MR. RASMUSSEN: The FBI had the responsibility
6 for the criminal investigation of this officer-involved
7 homicide. That that's not something -- although the
8 United States, in its brief at one point, actually
9 disputes that. It is something that we have in the joint
10 stipulations that the United States had that
11 responsibility. And it's from that investigative
12 responsibility, the District Court said that that also
13 then -- they're the ones that had all the responsibility
14 for spoliation. But they certainly had the investigative
15 responsibility for this crime. They were notified of the
16 events as the chase was going on. Before there was --
17 the car was stopped, the FBI was involved. They arrive
18 at the scene later, but they're monitoring it prior to
19 that.

20 THE COURT: They weren't there.

21 MR. RASMUSSEN: What?

22 THE COURT: But they weren't there.

23 MR. RASMUSSEN: They weren't there, but they
24 had -- at the point where there is -- a homicide has
25 occurred, then it is within their jurisdiction and they

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1 have that responsibility. So my view is that we start
2 from the point where the homicide occurred, that they
3 certainly have the responsibility from that point.
4 There's an argument to be made that they had it from
5 before that, but we don't even need to deal with that.
6 They certainly had it by the time that the shots are
7 being fired. They then have the investigative
8 responsibility, the duty to preserve the evidence and
9 they --

10 THE COURT: Even before they get to the site?

11 MR. RASMUSSEN: Yes. Because they're -- again,
12 they're on -- they're communicating with dispatch about
13 this ongoing matter. They don't get to the site --

14 THE COURT: But they don't have eyes on the
15 site at that point.

16 MR. RASMUSSEN: They don't have eyes on the
17 site at that point, but they do have the investigative
18 responsibility for it, yes. But what we're talking;
19 about -- and so in that interim, what we have potentially
20 as evidence is there is some spoliation where the
21 officer, Officer Norton, is allowed to go back to his
22 vehicle to do other things, go through the crime scene,
23 some of those sort of things.

24 But even if we say that they don't have a
25 responsibility until they get to the scene, the real --

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1 the most crucial evidence and the biggest spoliations
2 were those with the guns that we talked about and not
3 preserving the clothing and having it tested. And those
4 all were things that were clearly after they got there.
5 So perhaps we don't even need to deal with that issue of
6 whether they had the responsibility for that half-hour
7 before, approximately half-hour before because they
8 certainly have it for those key pieces of evidence and
9 then the evidence later as we go along at the mortuary,
10 at the hospital, that the United States has the
11 responsibility for that as the investigative agency.

12 The -- one of the things the United States
13 says, the litigation was not reasonably foreseeable, and
14 I wanted to note that the Court -- the Circuit Court has
15 said, you know, we really can't define it much more than
16 that, not reasonably -- whether it was reasonably
17 foreseeable, of course, is a relatively vague standard.
18 It is a multifactor test. We look at everything that was
19 going on. We look at all the facts. The District Court
20 did that, and this is one of the areas where there isn't
21 anything different than what the District Court saw. The
22 District Court heard Officer Ashdown testify that, oh, I
23 -- yeah, I didn't realize there would be litigation. And
24 the District Court didn't find that very persuasive and
25 rejected it. Said, no, litigation was reasonably

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1 foreseeable.

2 We have an officer-involved homicide. The
3 United States has the duty to investigate and to charge
4 if there's wrongdoing. There are a number of potential
5 crimes that they could have investigated besides just the
6 homicide itself and that -- if they didn't -- if they
7 weren't going to charge anybody, of course there's going
8 to be litigation on the civil side in this matter. The
9 District Court cites to the long history of the
10 litigation between the tribe and the state and the state
11 officers going onto the reservation, violating the
12 tribe's sovereignty, violating the integrity of the
13 reservation.

14 The U.S. was well aware of that history and it
15 is, of course, the tribe's trustee and its police force.
16 So it had the ability to foresee that, of course, there's
17 either going to be a criminal case here or there's going
18 to be civil litigation. That's what the District Court
19 was looking at and looking at those factors and said,
20 yes, this is foreseeable because there's going to be
21 litigation here one way or the other. And that then
22 kicks in the duty to preserve the evidence.

23 We would also note that although the United
24 States is saying, well, we saw stuff and we thought, oh,
25 this was a suicide, they did gather some evidence. It's

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1 not that they didn't gather evidence; it's that they
2 didn't gather the evidence that was going to be helpful
3 to Mr. Murray. It appears that they didn't really
4 believe Officer Norton and chose not to gather the
5 evidence that would have proven it one way or the other,
6 but they did gather some evidence. They gathered the
7 evidence to show where Officer Norton said he found his
8 bullet casings. They gathered evidence in a number of
9 pictures, but what they did gather was just the basic key
10 evidence that would have proven or disproven the
11 officer's story. So they seem to have a keen sense that,
12 yes, litigation was coming, but they didn't gather the
13 evidence that we really needed in this case, and it's
14 those pieces of evidence.

15 Then when we look at what the remedy should be
16 -- and I agree, when I look through our brief and the
17 United States' brief and look through the facts here, I
18 think it is very difficult to figure out what to do
19 because we're talking about that the remedy has to
20 remediate the spoliation and the spoliation here is these
21 pieces of evidence that would have told us one way or the
22 other -- very likely told us one way or the other that --
23 that certainly if the United States had forensically
24 tested the gun -- guns, it would be saying, look, here's
25 really solid evidence that this is how the events

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1 occurred, that Officer Norton's gun has blood on it, that
2 means he did this; that this gun has blood on it means a
3 different story. They would be telling us all of that --

4 THE COURT: Are you suggesting that Officer
5 Norton's gun would have had blood on it? I'm not sure
6 what I'm hearing you say.

7 MR. RASMUSSEN: I'm saying if they tested it
8 and it did have blood on it, that would definitively
9 prove that Officer Norton did the shooting, yes.

10 THE COURT: Why is that likely? We he close
11 enough for that to have even happened to this body?

12 MR. RASMUSSEN: Well, he says he was not.

13 THE COURT: Right.

14 MR. RASMUSSEN: And so if he -- if there was --
15 he was -- his testimony is he was far -- halfway up that
16 hill. In fact, I think that picture is taken from his
17 perspective.

18 THE COURT: But even if he wasn't halfway up
19 the hill, let's say he was closer, how frequent is it for
20 a gun of a shooting officer or of anybody -- a shooting
21 person --

22 MR. RASMUSSEN: Right.

23 THE COURT: -- to have blood on it if the body
24 is even not right on top of them?

25 MR. RASMUSSEN: Right, that's my point is that

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1 one of these two guns, unless there's other guns out
2 there they've just -- that the scene has been more
3 contaminated than we --

4 THE COURT: Well, we don't have any indication
5 of that, do we?

6 MR. RASMUSSEN: Right, right, no, we don't. So
7 we have two guns. One of those guns should have blood on
8 it and we don't know which one. We have a picture of the
9 one gun that doesn't seem to show it. We don't have any
10 testing of either gun, though. One of those guns should
11 have blood on it. If Officer Norton's gun had blood on
12 it, that would show not only that he was -- his whole
13 story was false, but --

14 THE COURT: Yeah, but that's really --

15 MR. RASMUSSEN: -- that he was up close to Mr.
16 Murray.

17 THE COURT: But that's hypothesizing rather
18 deeply, isn't it, that last point of yours on Officer
19 Norton's gun?

20 MR. RASMUSSEN: What it's saying is that the
21 basic test for these things would be to have tested those
22 guns forensically to see if they have blood on them.

23 THE COURT: You're just saying it would have
24 been better procedure to have both guns tested. But we
25 have no reason to think that Officer Norton was right on

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1 top of him, do we?

2 MR. RASMUSSEN: Yes.

3 THE COURT: Right on top of him?

4 MR. RASMUSSEN: Yes.

5 THE COURT: Why?

6 MR. RASMUSSEN: Because that is the only story
7 that fits with what little evidence we have that is
8 gathered.

9 THE COURT: Okay. Explain that.

10 MR. RASMUSSEN: What we have is we have a gun
11 that Officer Norton says shot Todd Murray and that was
12 not the weapon that shot Todd Murray. It does not appear
13 to have the blood on it that it would have.

14 THE COURT: And there are no ballistic studies?

15 MR. RASMUSSEN: There are no ballistics on the
16 guns. One of the smaller pieces of evidence that was
17 spoliated was with regard to the autopsy that we don't
18 have sufficient data to try to determine whether there
19 was any trace elements that we could then trace back to
20 shell casings, for example. We don't have the bullets
21 themselves. There was no effort to find the bullets
22 themselves. And so we don't have anything other than
23 these guns.

24 But one of those two guns -- there's only two
25 there -- one of those two guns has to have blood on it.

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1 The basic thing would be to say, let's test these two
2 guns and see which one has that.

3 THE COURT: I'm not following that. I
4 understand the one, but I don't understand why you say
5 that the officer's gun would necessarily have to have
6 blood on it.

7 MR. RASMUSSEN: No, I'm saying if it -- no, it
8 wouldn't necessarily. If it did have blood on it, that
9 would be dispositive proof that Officer Norton did the
10 killing. It would be dispositive. One of those two guns
11 would have it. That would be dispositive proof. If
12 Officer Norton's clothing had any of Todd Murray's blood
13 on it, that would be dispositive proof.

14 Yes, we believe that Officer Norton was right
15 up against Todd Murray.

16 THE COURT: And what's your basis for that?

17 MR. RASMUSSEN: That the gun that they're
18 saying was used to shoot Todd Murray was not the gun that
19 shot him.

20 THE COURT: I understand. But what's your
21 basis for saying that he was right up against him?

22 MR. RASMUSSEN: There's no one else -- again,
23 we don't --

24 THE COURT: You don't have any real information
25 that says they were close up against each other.

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1 MR. RASMUSSEN: What we have is -- the evidence
2 that we do have doesn't support the --

3 THE COURT: I understand there are gaps. But
4 you don't have anything positive that suggests they were
5 close together or do you?

6 MR. RASMUSSEN: No. What we have is the
7 shooting was at close range. Whoever shot him was there,
8 right up by him, put the gun to his head and pulled the
9 trigger. That's what we have. And we have this one gun
10 that does not appear to be the weapon. We only have two
11 people there; we only have two guns there.

12 THE COURT: And I understand that it would be
13 very difficult for the family to think that a member of
14 their family shot himself. I get that.

15 MR. RASMUSSEN: Right.

16 THE COURT: But I'm trying to figure out what
17 it is that you think places Officer Norton in closer
18 proximity to the victim.

19 MR. RASMUSSEN: Than he says? We don't believe
20 a word of what he says. That's essentially it. But the
21 reason that we -- also the reason that we don't is that
22 what little physical evidence was gathered does not
23 appear to be consistent with his story.

24 THE COURT: All right. Let me ask you a couple
25 questions about the legal arguments here.

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1 MR. RASMUSSEN: Mm-hmm.

2 THE COURT: So is there a requirement for bad
3 faith? Is it only for dispositive sanctions, or if we
4 found lesser sanctions, is bad faith by the Government
5 still a requirement or does negligence suffice in lesser
6 sanctions?

7 MR. RASMUSSEN: Certainly, negligence suffices
8 for lesser sanctions. As to whether it is required for
9 dispositive sanctions, generally, I would say generally
10 it is, but still the goal of sanctions is to put the
11 parties back where they should be if the evidence hadn't
12 been spoliated. So, you know, we get to --

13 THE COURT: So do you need bad faith or not?

14 MR. RASMUSSEN: So our review is that because
15 the sanctions that are necessary because of the failure
16 to gather the dispositive evidence is -- really results
17 in a default judgment that we don't need it. Again, I
18 think the alternative would be we could have people do
19 whatever they could reconstruct based upon let's assume
20 this gun doesn't have blood on it and then go from there.
21 We could do that.

22 But I think -- as I viewed it and I -- the
23 United States can make their response -- as I viewed it,
24 that wasn't the direction they would go. If it's like
25 this gun doesn't have blood on it, that's not the murder

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1 weapon. But if they want to dispute that, yeah, I think
2 we can say, let's assume that gun doesn't have blood on
3 it because it doesn't appear to and you didn't do the
4 forensic testing, the basic forensic testing.

5 Now, let's go from there with that assumption
6 and let's see what the experts say. I think they would
7 come back, but we can deal with that later.

8 THE COURT: So you suggested that the FBI
9 should have had control of the evidence from the point
10 that they were on the radio dispatch --

11 MR. RASMUSSEN: Mm-hmm.

12 THE COURT: -- forward.

13 MR. RASMUSSEN: Mm-hmm.

14 THE COURT: I'm not sure how I evaluate the
15 point at which the United States, either through the FBI
16 or whatever, had control of the evidence, of the parts
17 that were there when they got there and parts that
18 potentially were spoliated before they got there. How do
19 I determine that?

20 MR. RASMUSSEN: I think what we have to do is
21 we have to say what is a -- what is the reasonable
22 procedure at that point and --

23 THE COURT: Is it reasonable or is it standard
24 procedure or what is it? In other words, if they have an
25 operational way of doing their cases, is that what we

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1 should use, standard operating procedure kind of thing,
2 or what -- what should the test be of that?

3 MR. RASMUSSEN: Well, there certainly is case
4 law that says, you know, if this is the evidence you're
5 supposed to gather or this is what you're supposed to
6 keep, these are the records you're supposed to keep and
7 you don't have that, that we apply spoliation.

8 THE COURT: This is a little bit different,
9 though.

10 MR. RASMUSSEN: Right.

11 THE COURT: I mean, this is -- this is -- you
12 know, normally in the situations that you're going to
13 read out in the standard cases, it's going to be officer
14 at the scene, officer secures the scene, officer secures
15 the -- you know, secures and bags the things and takes
16 them and puts them into the locker, signs them in, signs
17 them out if they were going to go out. A lot of things
18 happened here that were a little bit different. But can
19 you make the U.S. responsible for that before they ever
20 got there. This is the hard one in this case.

21 MR. RASMUSSEN: I think this is the hard one in
22 this case is that -- and I think that's a relatively
23 small amount of evidence that potentially was going to be
24 very significant. But I don't think, for example,
25 Officer Norton, if we assume that when he went up to his

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1 car, he was -- what he was doing was cleaning off his
2 hands of the blood, that even if we had done forensic
3 testing of that blood, I don't think it would have been
4 sufficient that it would have completely eliminated all
5 the blood from his clothing or from his hands.

6 So, you know, what we -- there was evidence
7 that was spoliated before the FBI got on the scene. That
8 I -- that part -- and, again, I think it's less than half
9 an hour, but that period of time is the difficult one, I
10 think. After that point in time, after they get on the
11 scene, that's where we end up with the guns --

12 THE COURT: Well, that's the easier part.

13 MR. RASMUSSEN: Yeah, I think so, right.

14 THE COURT: That's easier to figure out.

15 MR. RASMUSSEN: But that first part, our view
16 is that we are -- we're talking about do they have a duty
17 at that point. Yes, they have the duty at that point.
18 They have the responsibility for that investigation.

19 THE COURT: Sure, I understand what you're
20 saying. Let me ask you a different question.

21 MR. RASMUSSEN: Okay.

22 THE COURT: You know, burdens of proof kind of
23 looks like a little tennis match sometimes. It goes back
24 and forth. Where do see the burden of proof? Does it
25 shift here? You've got the burden at some point to prove

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1 spoliation.

2 MR. RASMUSSEN: Mm-hmm.

3 THE COURT: Is there a point at which it
4 shifts?

5 MR. RASMUSSEN: I don't recall -- I don't
6 recall any of the cases ever talking about the burden
7 shifting. They do talk about that -- oh, gosh. I think
8 they use slightly different terms to kind of refer to
9 that, though, that, you know, when we're dealing with
10 something that was supposed to be collected that -- and
11 we know that, that that then -- the other side has to
12 come forward with a reason for -- you know, an
13 explanation essentially. But I don't recall any of the
14 cases talking about a shifting -- an actual shifting of
15 the burden.

16 THE COURT: So assuming, as you may have
17 gathered, I'm not there for a default judgment at this
18 point.

19 MR. RASMUSSEN: Right.

20 THE COURT: What are the specific sanctions
21 you're seeking?

22 MR. RASMUSSEN: Well, I think the most
23 important thing is that --

24 THE COURT: And what inferences are you seeking
25 to get out of that?

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1 MR. RASMUSSEN: What's that?

2 THE COURT: And what inferences are you seeking
3 to get out of that?

4 MR. RASMUSSEN: Right, right. I think the most
5 important thing is that with the -- you know, we have the
6 one gun that they say Todd Murray shot himself with. But
7 -- and they clearly have that gun, had control of that
8 gun, that we -- the Court should say we have to assume,
9 based upon the picture and because there is no forensic
10 testing of that gun, that we have to assume that that gun
11 does not have his blood or tissue on it, does not have
12 his fingerprints on it. I think that's what we would
13 have to do.

14 THE COURT: So you're -- in every way, what
15 you're really doing here is when you say that the effect
16 of the sanctions should be -- and I'm quoting for you --
17 that the bad man for whom the United States has a
18 responsibility killed Mr. Murray, and that's essentially
19 a default judgment. Right?

20 MR. RASMUSSEN: Well, that's one of the
21 things that I -- I think -- and that's why I think the
22 default judgment is, in effect, the remedy here is
23 because that -- I don't think there is any other
24 plausible story or way of dealing with this case if that
25 gun does not have his blood on it. There's -- Norton is

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1 the sole witness and his sole story is that that was the
2 gun that shot Todd Murray, and it wasn't.

3 THE COURT: So let me put it in the context of
4 a typical trial. When sanctions for spoliation are
5 sought, it's generally to knock out the credibility of a
6 particular witness --

7 MR. RASMUSSEN: Mm-hmm.

8 THE COURT: -- or an inference that certain
9 documents would have said what they would have said, so
10 to speak, if they hadn't been destroyed. It's generally
11 not for a total judgment.

12 MR. RASMUSSEN: Right.

13 THE COURT: Is what you're asking that the
14 testimony of a particular witness, as best as we could
15 construct it, whether from the depositions or from
16 something else, be not found credible and would that be
17 Norton or is it something else? What I -- the trouble
18 I'm having with your filing is -- and, I mean, you
19 actually will have a chance to be more specific in
20 supplemental filings.

21 MR. RASMUSSEN: Okay.

22 THE COURT: But the trouble I'm having is if we
23 don't go the default judgment route, which I'm
24 disinclined to do --

25 MR. RASMUSSEN: Mm-hmm.

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1 THE COURT: -- although I could change my mind,
2 but, you know, what do we do with it? Do we restrict the
3 results of spoliation and sanction to a particular part
4 of the case, to something else? How do we navigate this?

5 MR. RASMUSSEN: Well, again, the purpose is
6 primarily to impose a remedy that but for that
7 spoliation, this is where we would be. And in this case,
8 the evidence that was spoliated was was there blood or
9 tissue on the gun.

10 THE COURT: No, I understand.

11 MR. RASMUSSEN: What -- we don't have much
12 other than -- that we can do to remedy that other than
13 saying let's assume --

14 THE COURT: So is one thing the inevitability
15 of a trial -- that's kind of where it was headed. Is it
16 the inevitability of a trial which shifts that burden
17 that we talked about earlier to the Government to show
18 that whatever happened here in terms of spoliation did
19 not prejudice the case as a whole or why it was not
20 default-judgment-worthy basically?

21 MR. RASMUSSEN: Um...

22 THE COURT: That's part of the reason why I ask
23 about the inevitability of a trial.

24 MR. RASMUSSEN: Right. I don't see that as a
25 sufficient remedy because, again, I think what we're

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1 looking at is evidence that would have been dispositive
2 that was not gathered, basic evidence that would have
3 been dispositive.

4 THE COURT: But wouldn't the Government have
5 the right to at least prove the absence of the prejudice
6 to their case?

7 MR. RASMUSSEN: Yes, no, I think they -- I
8 think they would. I don't see --

9 THE COURT: So we're going to trial.

10 MR. RASMUSSEN: Well, I --

11 THE COURT: A long, drawn-out trial,
12 unfortunately. I mean, we'll do it as quickly as we can,
13 but, you know, it does mean gathering evidence that's --
14 you know, that's out there that -- we can't use the
15 District Court decision.

16 MR. RASMUSSEN: Right.

17 THE COURT: It's a very odd position. I've
18 never been in this position before, but --

19 MR. RASMUSSEN: Me either, Your Honor.

20 THE COURT: I'm sure you haven't either, I'm
21 sure.

22 MR. RASMUSSEN: Yes.

23 THE COURT: But that's what both makes it
24 interesting and difficult.

25 MR. RASMUSSEN: Yeah.

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1 THE COURT: But interesting is not generally
2 good --

3 MR. RASMUSSEN: No.

4 THE COURT: -- because it means cost, it means
5 time, it means testimony, it means travel. It means all
6 kinds of things. And the other thing I want you to think
7 about -- and I don't think you need to answer right now
8 necessarily, but you can if you want to, is in order to
9 figure out spoliation particularly of the gun and maybe
10 some of the other items, do we need the expert testimony
11 now? It's the angle issue. It's the but-for issue that
12 you raised with blood.

13 MR. RASMUSSEN: Right. I guess -- I mean, I
14 was thinking we didn't need that, but that might be
15 actually to say, yes, would -- if this gun doesn't have
16 blood on it, what does that mean to have the experts
17 opine on that. Would that be possible, if this were the
18 murder weapon, to have the experts opine on that?

19 THE COURT: Yes. Because where I find myself,
20 frankly, is guessing and I don't -- I'm not in the
21 business of guessing. Courts don't guess.

22 MR. RASMUSSEN: Right.

23 THE COURT: And so do I need this -- some
24 expert testimony on all of these items that are
25 significant?

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1 MR. RASMUSSEN: I think that would certainly
2 help the Court.

3 THE COURT: Well, that's what this is about.

4 MR. RASMUSSEN: Yes, yes.

5 THE COURT: I have to issue a decision.

6 MR. RASMUSSEN: I'm pretty sure what -- I'm
7 pretty sure what those come back as. But, yes, I think
8 the Court is struggling with issues there. I think
9 there's not much of a question about if this gun doesn't
10 have blood on it, Norton's story is a lie.

11 THE COURT: But I don't have any basis, except
12 hearing you testify, which you can't do because you're
13 not a testifying witness.

14 MR. RASMUSSEN: Right.

15 THE COURT: You're the lawyer who gets to
16 summarize testifying witnesses.

17 MR. RASMUSSEN: Right.

18 THE COURT: But I need a testifying witness.

19 MR. RASMUSSEN: No, I was summarizing what we
20 had from the doctor who said that the blood and -- the
21 gun and the hand would have been covered in blood.

22 THE COURT: Right.

23 MR. RASMUSSEN: The gun and the hand that
24 killed him would have been covered in blood. That's
25 where I got that part of it. But, yeah, I think we could

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1 do experts to go more specifically into that, whether
2 there's any way that it could be otherwise.

3 THE COURT: Anything else that I need to hear
4 or are we ready to turn to the Defendant?

5 MR. RASMUSSEN: Well, I just wanted to briefly
6 -- because the Court did raise it a bit ago about the --
7 whether when we're talking about -- I think the
8 Government has an argument that when we're talking about
9 the remedy against them, that it has to be bad faith.
10 And what they're citing -- all the cases they're citing
11 are criminal cases under the due process clause. They
12 are not spoliation cases.

13 In fact, they cite one 10th Circuit case that
14 makes that distinction and says, here we're dealing with
15 the due process issue and then they say -- the Defendant
16 also raises on appeal, for the first time, a civil
17 sanctions issue. But, for instance, if we're dealing --
18 the Supreme Court case that they cite to the Court is a
19 case where the United States Supreme Court is reviewing a
20 case from Arizona, from the state courts, and so it has
21 to be dealing with a constitutional issue and is saying,
22 there's not a due process constitutional issue.

23 Spoliation sanctions are not a constitutional
24 issue. As we discuss in our briefs, they are -- the
25 purpose of them is civil and is to remedy the problem.

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1 And so those cases don't apply here. None of those cases
2 apply here.

3 THE COURT: So if we were to do a hearing on
4 experts, I assume we could do that now, but that would
5 not -- not today, but, I mean, we could do that first.

6 MR. RASMUSSEN: Right.

7 THE COURT: And that still would not preclude
8 the need for a trial at the end of it. So what you're
9 talking about is long and gory.

10 MR. RASMUSSEN: Yes, I heard the Court very
11 clearly on that and we'll be talking to the United States
12 after the hearing about that.

13 THE COURT: I think you're going to have to
14 because this doesn't make sense for anybody, frankly, in
15 my mind. I mean, I'm happy to do it. I'm here on
16 permanent retainer. So is the Government.

17 MR. RASMUSSEN: Right.

18 THE COURT: But -- which is one of the problems
19 often in litigation. But, you know, I like trials. I
20 don't get enough of them, as you know. Only about 5
21 percent of cases, if that, maybe 2 percent, go to trial
22 in Federal Court. So I'd be happy to do that and it
23 takes me back into a world that I find fascinating. So
24 all is good and I'm here to do it. But whether that
25 makes sense for you is a very different issue.

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1 MR. RASMUSSEN: Yes, it is.

2 THE COURT: And then, of course, we have the
3 distinct possibility, whoever wins, that the other side
4 would appeal it anyway. So then you go back up to the
5 Circuit. It took a year and a half the last time. We
6 weren't all that speedy ourselves. But, you know, we
7 take time to do it right, both here and in the Appellate
8 Court, and these are not your usual issues. So that
9 generally translates into some more thoughtfulness and,
10 therefore, to time.

11 So if you're thinking about, you know, we go
12 through whatever the Trial Court has to go through, then
13 you potentially go through an appellate process again,
14 and Heaven forbid another remand. I've only had one or
15 two cases in which we've had double remands in the 30
16 years that I've been here, but they are long and they
17 don't necessarily make sense for private plaintiffs
18 particularly. The corporations, it's kind of part of
19 what they do.

20 But, you know, I think you need to think long
21 and hard about whether you want to talk to the United
22 States, if the United States is willing to talk to you.
23 Although I'll give them the same speech in the sense that
24 this one has some bad precedential potential and, you
25 know, they should want to talk to you as well as you

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1 should want to talk to them. But it's up to you
2 individually. I can only make suggestions in that
3 regard. I can't force anybody to the table.

4 I run the ADR program here. It obviously would
5 not be me. But one of the things that, you know, I've
6 seen in running that is there really are cases in which
7 it makes more sense than in others and it also makes
8 absolutely no sense unless both parties are willing to
9 come to the table and are serious about coming to the
10 table. And I -- when I conduct the ADRs for some of my
11 colleagues, I am very happy and very willing to call it
12 if they're just coming to the table just to chat with
13 each other, and we go home that same day.

14 But if people are serious about coming to talk,
15 then I think this might be a good situation in which to
16 do it. I don't know that you need an ADR reference for
17 it. I think you could do it yourselves. But that's all,
18 you know, up to you all.

19 MR. RASMUSSEN: Okay, thank you.

20 THE COURT: All right. Mr. Petrie? So let's
21 start with default judgment and get that out of the way
22 because I think I know what you're going to say.

23 MR. PETRIE: Good afternoon, Your Honor, Terry
24 Petrie. You're correct. The United States does not
25 believe default judgment is appropriate and it's not

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1 warranted here for the various reasons that we have
2 arrived at, which include from the get-go that we do not
3 think spoliation has happened on the FBI's watch.

4 What I would suggest, Your Honor, if I may, is
5 to start out with just a brief overview of some of the
6 facts that occurred there.

7 THE COURT: Oh, I know the facts, honestly,
8 from what we've got.

9 MR. PETRIE: Yes.

10 THE COURT: We've got some documents. We've
11 got a trial court in Colorado. We've got the recitation
12 of facts that I wrote for the decision I wrote.

13 MR. PETRIE: Your own decision.

14 THE COURT: A brief summary of that. So I
15 don't think we need to do it. What I want to focus on --

16 MR. PETRIE: Yes.

17 THE COURT: -- is the item -- I don't need the
18 sort of general overview. What I want to focus on is --
19 and I'm sorry if I'm cutting off something that you
20 prepared carefully and want desperately to deliver, but
21 we're going to move on to what we're hearing you talk
22 about. There's been a request for spoliation sanctions,
23 and even if we don't get a default judgment, the
24 inference is some of which could immediately trigger the
25 bad man statute. There are not quite a dozen of those

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1 items and that's what I think you need to focus on and
2 tell me why -- and let's start with the guns since that
3 seems to be the one that the Plaintiff feels is the most
4 important.

5 MR. PETRIE: Your Honor, if I may, the way I
6 view it is that when we consider the requirements that
7 the Federal Circuit imposed in the Jandreau case --
8 that's what we're measuring the facts against to
9 determine whether or not sanctions are appropriate here.

10 THE COURT: And that's what?

11 MR. PETRIE: And those three requirements are
12 first that the -- in this case, the Plaintiffs bear the
13 burden to establish all three of those requirements. And
14 the first requirement is that they have to be able to
15 show that the spoliator, here the United States, the FBI,
16 that they had the duty to preserve the alleged spoliated
17 evidence as well as had control over that evidence as
18 well.

19 And as Mr. Rasmussen mentioned in passing, and
20 he's correct, that duty to preserve the evidence, the
21 allegedly spoliated evidence, is triggered once it is
22 reasonably foreseeable that litigation would ensue.

23 THE COURT: Okay. Any criminal case,
24 obviously, that triggers pretty much, doesn't it?

25 MR. PETRIE: No, it does not, Your Honor.

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1 THE COURT: Really?

2 MR. PETRIE: That's correct, Your Honor. It
3 does not. Because the FBI, in this case Special Agent
4 Ashdown, a gentleman who was within two months of his
5 retirement, so he had been an FBI agent for a long time,
6 he arrived at the scene and he did what he was supposed
7 to do, which was to evaluate the evidence at the scene.

8 THE COURT: So are you telling me there was no
9 duty to preserve at the scene?

10 MR. PETRIE: That's --

11 THE COURT: Not on individual items, but
12 generically?

13 MR. PETRIE: The -- if there is an obligation,
14 it's triggered by what he is evaluating to determine
15 whether or not there is --

16 THE COURT: That's the only question. Do you
17 believe in this case that there was no duty to preserve
18 any of the evidence even though a murder had occurred or
19 a very, very serious injury had occurred?

20 MR. PETRIE: For spoliation purposes, that is
21 correct, I do not. Now, he's got an obligation to --

22 THE COURT: So when and if --

23 MR. PETRIE: -- conduct his investigation.

24 THE COURT: -- when and if did the duty to
25 preserve trigger in this case or not at all? What are

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1 you saying?

2 MR. PETRIE: I'm saying that for spoliation
3 purposes, that obligation was not triggered here because
4 the --

5 THE COURT: Here at what point? The whole
6 time? The whole case?

7 MR. PETRIE: The entire time, that's correct,
8 Your Honor. If it did, it would have been when the
9 Plaintiffs brought suit against the United States. Well,
10 actually, it would have been back in March of 2012,
11 somewhere in there, where the Plaintiff --

12 THE COURT: What are you telling me --

13 MR. PETRIE: -- served notice on the United
14 States that they had claims to include a wrongful death.
15 But before that, the chronology shows that the FBI there
16 in Utah had no indication that the Plaintiffs had served
17 notice to the State of Utah and other local government
18 agencies of their intent to file claims and ultimately
19 sue, starting initially in the state court.

20 THE COURT: So at a criminal scene or
21 potentially criminal scene, there's no duty to preserve
22 or to investigate or -- nothing triggers because in this
23 case you get to wait until a civil suit is filed?

24 MR. PETRIE: No, I'm talking specifically in
25 the context of spoliation, which is the issue here before

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1 the Court. And, Your Honor --

2 THE COURT: I understand the spoliation issue.
3 But I'm just asking you whether there was a duty at any
4 point to --

5 MR. PETRIE: The duty --

6 THE COURT: Don't interrupt me, please.

7 MR. PETRIE: Yes, Your Honor.

8 THE COURT: Was there a duty at any point to
9 preserve the evidence in this shooting case?

10 MR. PETRIE: And to the extent that duty
11 exists, it would have been a function of the protocols
12 and the standards employed by the FBI when they
13 investigate the scene of an incident. And what we have
14 here --

15 THE COURT: Okay, stop for a moment because I
16 can't follow you that fast.

17 MR. PETRIE: Sure.

18 THE COURT: Was there any information
19 introduced at the District Court or do we have
20 information of at the time of this particular shooting,
21 what the protocols were?

22 MR. PETRIE: I have not been able to obtain
23 information about the protocols. What I did, though,
24 Your Honor, was I took a look at the FBI's edition of the
25 Manual for Investigations and Operations Guidance at that

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1 point in time. And it indicated there -- and we cite it
2 in our brief, that the investigator is to arrive and take
3 a look and evaluate what they have there and that that
4 gentleman determined, based upon the information that he
5 was receiving, and then personally looked at that what he
6 was looking at was a case where Mr. Murray had shot
7 himself. So at that point, that then -- that's what
8 governed his activities there on the scene in
9 investigating it.

10 THE COURT: Is that what the FBI would do
11 today?

12 MR. PETRIE: Your Honor, I can't speak to what
13 the FBI would do today.

14 THE COURT: I just find it incredulous,
15 frankly, that in a shooting case, there wouldn't be some
16 concern for the evidence at the scene. I just don't -- I
17 can't understand it.

18 MR. PETRIE: Well, Your Honor, they did -- they
19 did have that. But, remember, please that the evidence
20 that they are going to preserve is a function of what
21 they observed there at the scene and what they had was
22 the fact that the shooter or, rather, Mr. Murray and
23 Detective Norton were nowhere close to each other. And
24 it's not just Detective Norton's word, but as is
25 evidenced in the District Court decision, that there is

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1 testimony that two other deputies, belonging to different
2 police agencies within the State of Utah, observed Mr.
3 Norton, as well as Mr. Murray, and that they were at
4 least 100 yards apart and that not only Detective Norton,
5 but also Mr. Anthoney Byron, one of the other law
6 enforcement officials there on the scene, observed Mr.
7 Murray fall to the ground and that there was no one there
8 in the vicinity of Mr. Murray. So it's not just
9 Detective Norton saying that.

10 THE COURT: I understand that. That's -- there
11 may be more.

12 MR. PETRIE: So --

13 THE COURT: But let me ask you this.

14 MR. PETRIE: Yes, Your Honor.

15 THE COURT: Did the FBI not preserve anything
16 at the scene?

17 MR. PETRIE: Yes, they did.

18 THE COURT: My understanding is they did
19 preserve some things.

20 MR. PETRIE: Yes, they did, Your Honor.

21 THE COURT: So why would they preserve some and
22 not some of the more salient items of potential evidence?

23 MR. PETRIE: Well, again --

24 THE COURT: What were they preserving it for
25 then? I mean, is this a totally incoherent site

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1 operation?

2 MR. PETRIE: No, Your Honor. I think what you
3 have is the preservation of evidence that relates to
4 their sense of what had happened there, which was that
5 Mr. Murray shot himself because factually they had no
6 evidence to suggest that Mr. Norton --

7 THE COURT: And they had no duty to figure it
8 out? They just could conclude from a visual on-the-spot
9 that, oh, my goodness, it's a suicide? It just doesn't
10 seem to make sense. I mean, it's a nice retroactive view
11 of this thing, but it makes no sense to me.

12 MR. PETRIE: Well, I respectfully disagree,
13 Your Honor.

14 THE COURT: All right.

15 MR. PETRIE: Because if you are investigating
16 something, you're going to take a look at what does that
17 evidence suggest. And when you have irrefutable -- and
18 Plaintiffs have not rebutted it -- that the -- Mr. Murray
19 and the detective --

20 THE COURT: Well, let me suggest to you --

21 MR. PETRIE: -- are over 100 yards apart.

22 THE COURT: All right, let me suggest this to
23 you. That is an argument that I saw in your briefs that
24 made me very, very uncomfortable at the time I read it
25 the first time, that suggests a level of -- and, you

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1 know, again, I'm not committing to how it would come out
2 at the end because I'm obviously going to get deeper than
3 I have to prepare for today because I wanted to hear what
4 you have to say. I will go back in this particular area
5 with far more questions than I walked into the room with
6 as to how you can make the judgments that you're alleging
7 made so much sense and that there was an automatic, in a
8 shooting case, assumption that this was a suicide.

9 I can't even imagine a current FBI or any other
10 law enforcement agent coming to that conclusion so
11 rapidly at the scene. It just doesn't make logical
12 sense. Now, we'll have to take everything we have, which
13 is disjointed information in this case, and try to figure
14 out what happened. But I can't imagine the FBI feeling
15 very comfortable in today's environment, which doesn't
16 matter, but in any environment, frankly, with that kind
17 of here, we'll do this, we won't do that, we'll do this,
18 we don't do that, it looks good, maybe it's a suicide,
19 sure it's a suicide, and walk away from the scene and
20 take some things.

21 MR. PETRIE: Your Honor, I --

22 THE COURT: At the very least, what you're
23 going to get from me in an opinion is --

24 MR. PETRIE: And I understand your perspective.

25 THE COURT: -- some comment on that.

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1 MR. PETRIE: I understand your perspective,
2 Your Honor. And, again, respectfully, from my
3 perspective, as I look at what --

4 THE COURT: Have you ever been in law
5 enforcement?

6 MR. PETRIE: Not as a law enforcement official,
7 no, I have not, Your Honor. I spent 20 years in the
8 United States Air Force. I've been an attorney. But
9 other than that, I --

10 THE COURT: I respect your history and your
11 preparation for this job. That's not what I'm asking.
12 This is -- this just grabs me wrong.

13 MR. PETRIE: Well, Your Honor, there is, I
14 think, the notion that when one arrives on a scene where
15 something has happened, you -- the investigator will take
16 an approach that responds to what the information is
17 there before them.

18 THE COURT: Well, maybe --

19 MR. PETRIE: Now, maybe what that amounts to
20 then -- and I cannot speak, as you've noted, from the
21 vantage point of having law enforcement experience. The
22 MIOG that I referenced here earlier, it did not spell out
23 specific procedures that are employed there on the ground
24 at an investigation. And so maybe -- even though I
25 personally believe that this does not require some kind

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1 of approach that employs experts because the facts are --
2 they're there and --

3 THE COURT: Well, you both think the facts
4 prove your case 100 percent. So that doesn't get me
5 anywhere.

6 MR. PETRIE: Well, Your Honor, the
7 Plaintiffs --

8 THE COURT: You relied -- you relied very
9 heavily in the papers you submitted on the District Court
10 and 10th Circuit opinions, what the Federal Circuit
11 specifically said we can't do, so --

12 MR. PETRIE: Yes, Your Honor.

13 THE COURT: -- I have to get away from that.

14 MR. PETRIE: Yes, Your Honor.

15 THE COURT: And I have to get away from your
16 doing that.

17 MR. PETRIE: And, Your Honor, if I may respond
18 directly to that. The evidence that is before this Court
19 is directly the evidence that was put before those two
20 courts. Now, certainly, the Federal Circuit has taken a
21 position about what this Court can do, vis-a-vis, that.

22 THE COURT: So what are you saying to me by
23 saying that? And I may not disagree with this part of
24 it. But I don't think we can rely on it as the District
25 Court and the Appellate Court in Colorado concluded. Are

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1 you saying that you have to submit to me all of the
2 evidence on these issues, these 11 or 12 issues that
3 Plaintiff is --

4 MR. PETRIE: No, I don't think we have to
5 because that evidence is there.

6 THE COURT: Let me -- can I finish my thought?
7 Can I finish my thought, please?

8 MR. PETRIE: Certainly, Your Honor.

9 THE COURT: All of these issues that the
10 Plaintiff has put forth as potentially triggering
11 sanctions, who do -- I can't trust -- for the purposes
12 here, I eminently trust the Federal District Court in
13 Colorado and the Federal 10th Circuit. They do good
14 work. But here I'm told that I can't do that. Normally,
15 we can rely on that issue preclusion basis. We can't
16 here. We can't rely on it as law of the case; we can't
17 rely on it as res judicata. We have to independently
18 look at spoliation issues.

19 So is the other alternate here having to take
20 whatever evidence was submitted to the District Court in
21 the factual issues, not the Circuit but to the District
22 Court to get the evidence that was submitted, which is as
23 close to contemporaneous as we're going to get and
24 anything else that there may be out there? I know that
25 we have some depositions in the earlier part of what we

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1 did here, but I don't think it's all of the material that
2 you're talking about. Do we have to look at that afresh
3 and brief it and go through it?

4 MR. PETRIE: Your Honor, as I see it, if Your
5 Honor is going to reach a decision on whether or not
6 spoliation has happened and whether sanctions are
7 appropriate, and if so, why, then the Court has to look
8 at what is the evidence, what happened. And that's
9 either going to come --

10 THE COURT: Well, then we have to get all that
11 evidence, right?

12 MR. PETRIE: That -- well, if we believe --

13 THE COURT: I can't take your summary; I can't
14 take the Plaintiffs' summary; and I can't take the
15 conclusions of the District Court.

16 MR. PETRIE: That's correct. You can't take
17 the conclusions of the District Court, but you can
18 certainly take the evidence that was put before --

19 THE COURT: I can't take their description -- I
20 can take the evidence -- the original documents and
21 evidence --

22 MR. PETRIE: And testimony.

23 THE COURT: -- that was submitted to them.

24 MR. PETRIE: Yes, Your Honor, I can see that.

25 THE COURT: But I cannot take their

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1 conclusions.

2 MR. PETRIE: Their conclusions. And agree.

3 THE COURT: I can't take their factual
4 statement.

5 MR. PETRIE: Yes, Your Honor.

6 THE COURT: All right. So --

7 MR. PETRIE: Completely agree.

8 THE COURT: -- do we have to review from de
9 novo essentially factually the circumstances of Mr.
10 Murray's death, whether --

11 MR. PETRIE: That's certainly my perspective,
12 whether we take the facts and the evidence --

13 THE COURT: So how in the world do you do that
14 on a motion to dismiss -- another motion to dismiss?
15 You've asked for another motion to dismiss. Which, by
16 the way, you cannot file until we agree that it's the
17 appropriate time.

18 MR. PETRIE: Yes. Yes, Your Honor.

19 THE COURT: Understand that loud and clear
20 because I'd --

21 MR. PETRIE: I do.

22 THE COURT: -- send it back to you in a
23 heartbeat at this point.

24 MR. PETRIE: I do, Your Honor. And I'm not
25 here to suggest that we are at a point --

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1 THE COURT: Well, you did suggest it.

2 MR. PETRIE: -- where we would ever be filing a
3 motion to dismiss. That's not my point. My point,
4 though, is --

5 THE COURT: That was your point.

6 MR. PETRIE: My point is that for the facts
7 that you are assessing to determine whether or not
8 spoliation has happened, and if so, what sanctions would
9 be appropriate, that's got to come from, at present, the
10 evidence that is of record. And to the extent we have
11 that, it's evidence that was put before the District
12 Court. That's the --

13 THE COURT: Okay. And what about the issues
14 that the Plaintiff has raised here today in terms of if
15 there's no blood on the gun, there simply can't be the
16 conclusion that he shot himself?

17 MR. PETRIE: Your Honor --

18 THE COURT: And whether or not we need experts
19 or would allow experts for that.

20 MR. PETRIE: If the Court is going to take an
21 approach where the parties are able to introduce
22 additional evidence, then certainly perhaps the use of
23 experts might be helpful. Yet, as it presently stands,
24 the evidence that is in the record before the District
25 Court shows that you've got a medical examiner that

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1 conducted an examination and he determined -- this is
2 evidence, not the Court's conclusion -- the District
3 Court may have reached the same conclusion, but the
4 evidence itself was that you had a medical examiner who
5 examined Mr. Murray's body and he determined that Mr.
6 Murray died from a contact wound and, moreover, that that
7 wound was not the sort of thing that would occur from a
8 shot over 100 yards away.

9 You also have from that medical examiner, his
10 testimony that indeed he could see how somebody who was
11 right-handed could place the weapon in a way that indeed
12 it would result in the kind of entrance wound and exit
13 wound that Mr. Murray experienced. And, Your Honor, he
14 also con -- and consistent with that perspective, that
15 Mr. Murray, indeed being right-handed, shot himself even
16 though it was from the left side of his head, he also
17 testified that -- and I apologize, I want to make sure I
18 get this correct.

19 That it was Mr. Murray's right hand that was
20 caked in blood. Mr. Rasmussen speaks at great length
21 about the left hand of Mr. Murray having no blood on it.
22 Well, that's not the point. The point is is that the
23 evidence was from the medical examiner that indeed it was
24 Mr. Murray's right hand that shot the weapon and that
25 indeed, consistent with that finding by the medical

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1 examiner, the right hand was covered with blood.

2 THE COURT: Didn't the medical examiner also
3 conclude that he couldn't be absolutely sure that it was
4 at his own hand?

5 MR. PETRIE: Yes, Your Honor. I don't think he
6 testified about the left hand, but there was some
7 testimony -- some questioning from the Plaintiffs'
8 counsel --

9 THE COURT: Right.

10 MR. PETRIE: -- about whether or not the kind
11 of wound that Mr. Murray experienced could happen solely
12 from over 100 yards away and -- or from a contact wound.
13 And the gentleman said no. But as the District Court
14 noted that Mr. -- or Dr. Leis, the medical examiner, he
15 was asked a hypothetical and that that hypothetical did
16 not include the consideration of additional evidence to
17 help inform his understanding of what happened. And Dr.
18 Leis testified that it included that additional evidence
19 that he was aware of, that had been brought to his
20 attention, that indeed when all was said and done, this
21 was a contact wound that Mr. Murray experienced at close
22 distance, not from over 100 yards away.

23 THE COURT: So we really just don't know
24 whether it was suicide or whether it was an officer-
25 caused gunshot. We have lots and lots of cobbling

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1 together pieces of evidence that don't totally fit, we
2 have inferences that each of us makes differently at this
3 point. So how do we get from A to Z here? I don't
4 believe default judgment is the right answer. You don't
5 either. I don't believe motion to dismiss, at this
6 point, is the right answer and maybe never. So we have
7 to figure out how to do this.

8 We do agree, I think, that we can't use the
9 conclusions of the District Court or the 10th Circuit.
10 We have direction from the Court of Appeals for the
11 Federal Circuit, which is binding on this Court, that we
12 have to do spoliation first, but not really a lot about
13 the standards for spoliation or who has the burden or
14 whatever, but just that we have to do it. And then we
15 have the potential that if spoliation is resolved and
16 doesn't come out in favor of the Government, that we then
17 could -- let me go to this footnote because I misquote
18 it. Hold on a second. Let me just get there again.

19 "That if the CFC determines that the federal
20 officer spoliated evidence, we leave it to the sound
21 discretion of the CFC to decide in the first instance
22 which of its findings, if any, were affected by the
23 spoliation and which were not."

24 We also have the direction that "the CFC
25 may" -- and, again, I'm reading from the opinion of the

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1 Federal Circuit -- "reconsider the application of issue
2 preclusion if the CFC concludes on remand that spoliation
3 sanctions are not appropriate or that the appropriate
4 sanctions would not change the evidential landscape for
5 particular issues." So we've got this very long, drawn-
6 out potential procedure that the Federal Circuit has
7 scoped for us.

8 I guess what I'm looking for is a way to get
9 from A to Z. So one of the things that I won't do is
10 speculate without going through careful steps regarding
11 collection of evidence and trying to come to some
12 conclusions that at least have some support. Because,
13 otherwise, whichever party loses is, quite justifiably,
14 going to go back to the Circuit and then we play remand
15 games again, which obviously none of us want to do. And
16 that would be within the Circuit's right if we have made
17 inferences, snap decisions, jumped from A to Z without
18 the middle being explained.

19 So is what we should do here -- and here's what
20 I think I'm going to propose. Obviously, I have
21 suggested to you all that you need to talk to each other
22 and figure out whether this really makes sense to go
23 through all these many and belabored steps and I gather
24 that both sides are pretty dug in. Is the United States
25 completely opposed to some kind of settlement?

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1 MR. PETRIE: Your Honor, at this point, we have
2 not discussed settlement.

3 THE COURT: All right. What I get from the
4 Department of Justice normally -- and I gather that
5 settlement or not settlement is within the purview of the
6 Department of Justice once you're in Federal Court. When
7 I was at the Department of Interior, that used to gall me
8 to no end and I definitely ended up in the Attorney
9 General's Office on at least one occasion saying no, yes
10 or whatever it happened to be in that case because I
11 happen to know him pretty well. So I was fortunate.

12 But the point being, I think it is something
13 that both sides should certainly consider here. I think
14 both sides have unrealistic expectations of what they can
15 achieve. I think the Plaintiffs have been through
16 horrible times and the litigation makes it worse, without
17 any question, and the belief firmly in a family member
18 not committing suicide. I get that. And the rest of
19 these proceedings aren't going to make it any easier and
20 I think the family has to come to a realistic
21 understanding of what's involved in the future as we try
22 to resolve this case.

23 The best case to get that, frankly, is from
24 your attorney, for him to explain to you the steps we're
25 now talking about and what the limitations are for a

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1 court in this situation, which do not include recognizing
2 that this is a horrible thing that happened, not -- we
3 can't really take cognizance with -- in a court of what
4 we're calling equity, which means our emotions, our
5 feelings of being sorry, our feelings of wishing that
6 there was some easy resolution for the family or --
7 whether it's monetary or otherwise, that doesn't get us
8 there. We have to follow the guidance of the statutes
9 and the case precedent and the law and sometimes the law
10 is a bit cruel, frankly.

11 On the other side of that, I look at this crime
12 scene and I say, this is a mess. I have a great deal of
13 respect for the FBI, but this is a mess. I have respect
14 obviously for the Department of Interior, but this is a
15 mess. And trying to figure it out, it's not been made
16 easier for any of us here in the courtroom by the remand,
17 but we have to deal with it. So what I'm going to
18 propose to you, frankly, is that we put together a path
19 that you all would propose to me as to how we get from
20 where we are to where we need to go on the issues of
21 spoliation, first of all. Then we'll worry about the
22 rest of it. But I think the rest of it will come,
23 frankly, from what I can see here.

24 I don't know that based on what I've got at
25 this point that I see a clear path that there either was

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1 spoliation or there wasn't spoliation. I see a mess.

2 That opens up the door for spoliation, certainly. But

3 we're going to have to go item by item by item by item.

4 I think that you all have to talk on a lot of

5 things. Possible settlement, a path to resolution of

6 spoliation, a path to resolution of the case as a whole

7 after spoliation. And in order to do spoliation, I

8 think the first thing you all have to do is put together

9 an administrative record of these documents that Mr.

10 Petrie says are there, we've got to look at. We have

11 some of them from the earlier case, but I don't believe

12 we have all of them. And so what I need -- because we

13 don't have all of them on some of the items that were now

14 on the spoliation list, for lack of a better descriptive

15 term.

16 So put together an administrative record that

17 has as much of the evidence that is cognizable without

18 the conclusions by the District Court, just the raw

19 evidence, whether it's deposition testimony, whether it

20 is coroner's reports, whether it is any other police

21 reports or FBI reports or BIA reports that were more

22 contemporaneous to the time, and then talk with each

23 other first and then talk about the experts you would

24 need, if any, and you can decide obviously for yourselves

25 on each side whether you want an expert or not. Again, I

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1 won't force you to, but, you know, we do know that very
2 often when one side has experts and the other doesn't,
3 that doesn't come out so well. But sometimes the expert
4 is not relevant and then it doesn't matter.

5 So I think what we have to do -- we're
6 certainly not ready. And the papers that you both filed
7 don't get me to a point where I have sufficient
8 information to decide this even close. So it would be
9 nice if we could -- I would love to do a default judgment
10 and be done with it, but it's the wrong answer.

11 So, you know, we are looking at some serious
12 effort on the part of both sides. I don't think this is
13 clean on either side. I mean, you know, you've got
14 someone running away from an attempted arrest or two
15 someones. You've got a crime scene presumably that the
16 FBI at some point was responsible for that wasn't handled
17 in a particularly exemplary fashion in any event, and
18 you've got huge gaps. So how we fill in some of those
19 gaps is what we're going to have to do.

20 So just off the top of your heads, how quickly,
21 Mr. Rasmussen and Mr. Petrie, do you think you can get an
22 administrative record to it, obviously well indexed,
23 consecutively paginated -- I don't want to see numbers 1
24 to 10 over the first document and then 1 to 10 over the
25 second document; I want continuous pagination so we all

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1 are able to talk about the same pages when we do deal
2 with it -- proposal for experts, and then we'll get back
3 together, frankly, after we have a chance to look at it
4 and see if it's a better path to resolving these
5 difficult issues.

6 The issues are difficult. You know, the events
7 occurred a long time ago, so the odds of, you know, some
8 of the actors even being available or, if available,
9 having any realistic memory I think are probably remote.
10 If you find somebody like that, that's fine, who was at
11 the scene, not the people who are going to give the
12 coloration. We're beyond coloration here. We don't need
13 the coloration testimony. What we need is actual
14 testimony. If there's somebody who really is -- memory
15 then, it becomes obviously credibility because that's a
16 huge issue with that much gap time. But contemporaneous
17 documents, reports, whatever, that would probably be our
18 best bet.

19 How long do you think you need, the two of you?
20 You're going to have to work together to get a joint
21 appendix.

22 MR. RASMUSSEN: Yes.

23 MR. PETRIE: Your Honor --

24 MR. RASMUSSEN: And we work well together.

25 MR. PETRIE: Yes.

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1 THE COURT: No, I'm not questioning that.

2 MR. PETRIE: Your Honor, may I propose that we
3 give you an update in what, a number of days, a week, so
4 we can compare notes and get some sense of --

5 THE COURT: I have no problem with that at all.
6 That's fine.

7 MR. PETRIE: That would be a good discussion,
8 yeah.

9 THE COURT: That's fine. And, you know, the --
10 it's kind of odd here because the more information we
11 get, it could work either way. You know, you need the
12 information to carry your burden of proof, but the
13 Government needs the information to support what seems a
14 little bit incredulous to me right off the bat in terms
15 of responsibilities and whatever. So I think, you know,
16 some of those manuals needs to be in there as well. I
17 mean, all of this -- it's a -- it's a situation that I
18 wish we didn't have to tackle in this way, frankly, but I
19 just don't know any other way to do it without making
20 huge guesses and ending up back in the Court of Appeals.
21 And that's the one thing we have to avoid.

22 So, yeah, you know, clearly, the better that
23 appendix is, the more likely we can do that on paper or
24 maybe with the experts if that is something that the
25 parties think would be helpful.

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1 MR. RASMUSSEN: Yes.

2 THE COURT: And talk to each other and see if
3 there's a resolution possible here because we're headed
4 into something that's going to take everybody a lot of
5 time to do it properly. I don't know how to do things
6 improperly in this situation, or I hope I don't. We just
7 have to go forward from here and try to work it out. But
8 I'd say there's risk for everybody on this one in terms
9 of losing, in terms of getting negative press, so to
10 speak. You know, I think we just have to move forward.
11 This is not a clean situation on any end.

12 So you all have -- how much time necessary to
13 confer with each other?

14 MR. PETRIE: What do you need, do you think?

15 MR. RASMUSSEN: Well, I was thinking if we
16 could submit something a little over a week -- like on
17 Monday so we have a good --

18 MR. PETRIE: Is that a week from this Monday
19 or --

20 MR. RASMUSSEN: Yes.

21 MR. PETRIE: How does that square with what you
22 guys got? So that would be the 23rd.

23 THE COURT: So that would be the?

24 MR. RASMUSSEN: That's right.

25 THE COURT: A week from today or a week and a

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1 half is what you're saying?

2 MR. PETRIE: A week from -- yeah, a week from
3 this coming Monday.

4 THE COURT: That's the 23rd.

5 MR. RASMUSSEN: Yes.

6 MR. PETRIE: The 23rd.

7 THE COURT: Okay, all right. And then we'll
8 take a look at it and try to digest it and then we'll
9 probably schedule another status conference. Now, I'm --
10 you know, we're a national court, so Mr. Rasmussen, we
11 can do this sort of thing on the phone very easily and
12 figure out the schedule. So it's really up to you more
13 than anybody else here as to whether you want to do it in
14 person or on the phone and I'll mostly defer.

15 Now, on an oral argument or on -- you know,
16 once we get to the end of this, I'll probably want to do
17 it in person. But in terms of scheduling or figuring out
18 next steps, we can easily place a phone call to you and
19 your Plaintiffs are certainly welcome to, I guess, go to
20 your office and participate if that's -- is that close to
21 where they are or not?

22 MR. RASMUSSEN: No.

23 THE COURT: Well, the other option is to -- you
24 know, we can add additional phone numbers. We can go up
25 to six, I think.

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1 MR. RASMUSSEN: Okay.

2 THE COURT: And you're in from Colorado as
3 well?

4 MR. PETRIE: I am, and I was -- a little side
5 note. I was comparing notes with Mr. Rasmussen before we
6 started today and I literally live about six blocks away
7 from their offices. So --

8 THE COURT: Well, you know, either way. I
9 guess, you know, then -- I wasn't focused until I just
10 got a note on the fact that you're in Colorado as well.
11 But, you know, then if you want an in person, we can do
12 an in person. If he wants an in person, if either one of
13 you wants an in person, we'll do an in person here. If
14 not, if you both agree that it can be sufficiently
15 handled over the phone, then we'll do that.

16 Mr. Rasmussen, do you want to turn to your
17 Plaintiffs and see if there's anything they would like
18 explained further or any questions they have? Because
19 they are immediately impacted, obviously.

20 MR. RASMUSSEN: I've got a lot to explain to
21 them. Is there anything you have for the Court? No,
22 we're good. Thank you.

23 THE COURT: Well, my sympathy to you for your
24 loss and we'll try to figure this one out. It's not
25 easy.

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1 All right, thank you. Safe trip back to
2 Colorado, everybody --

3 MR. RASMUSSEN: Thank you for your time, Your
4 Honor.

5 THE COURT: -- and back to your homes. Thank
6 you.

7 (Whereupon, at 4:38 p.m., the hearing was
8 adjourned.)

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1 CERTIFICATE OF TRANSCRIBER

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3 I, Elizabeth M. Farrell, court-approved
4 transcriber, certify that the foregoing is a correct
5 transcript from the official electronic sound recording
6 of the proceedings in the above-titled matter.

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10 DATE: 4/16/2018

S/Elizabeth M. Farrell

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ELIZABETH M. FARRELL, CERT

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